South Carolina Law Review

Volume 11 | Issue 1 Article 14

Fall 1958

Miscellaneous

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Recommended Citation

McCrackin, E. Windell (1958) "Miscellaneous," *South Carolina Law Review*: Vol. 11 : Iss. 1 , Article 14.
Available at: https://scholarcommons.sc.edu/sclr/vol11/iss1/14

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MISCELLANEOUS

E. WINDELL MCCRACKIN*

Costs

In *Avant v. Johnson*[1] the Court upheld the lower court's finding that the plaintiff had failed to prove his allegations of fraud, misrepresentations or undue influence, and its refusal to set aside the deed involved in the dispute. On the question of costs, however, the Court, reaching its conclusion on the equities of the case, ordered the defendants to pay such expenses.

Receivers

Vasiliades v. Vasiliades[2] was an action for partition of the decedent's estate. The plaintiff sought a portion of the estate on the basis of her being his widow by virtue of a Greek marriage ceremony. A receiver was appointed by the lower court based on the allegation of the complaint. Later it developed that the courts of the Kingdom of Greece held the marriage of plaintiff to decedent to be null and void from its inception.

The defendants then moved to dismiss the receiver which was granted by the lower court. A motion was made by plaintiff to obtain receiver's costs, compensation and attorney's fees. This motion was denied by the court.

On appeal the Supreme Court held that the lower court was correct in dismissing the receiver, this being a discretionary matter for the court, the same as that of appointing a receiver. It also held that receiver's cost, compensation, and attorney's fees were properly denied as such expenses could not be charged against the adversaries' portions of the properties involved. Actually the receiver never took possession of any property since the defendants posted bond to prevent it.

Patents

An action for a declaratory judgment interpreting a contract was brought in *Taco Corp. v. Hudson.*[3] Plaintiff was

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1. 231 S. C. 119, 97 S. E. 2d 396 (1957).
2. 231 S. C. 366, 98 S. E. 2d 810 (1957).
3. 231 S. C. 553, 99 S. E. 2d 419 (1957).

Published by Scholar Commons, 1958

the successor of another company which had contracted with the defendant patent licensor. The contract terms, *inter alia*, were to the effect that the plaintiff "shall pay to the [defendant] 27½% of the gross royalties received during that year from sub-licensees." Under another provision the plaintiff was given the right to sub-license the patent involved.

Plaintiff was also the successor to a franchise contract entered into between V. K. Dell and the prior company. Dell was given a large area in which to operate and provided for the sub-licensing of plants operated by him. For the franchise agreement, Dell guaranteed certain annual payments to the prior company in the event royalty payments did not reach said amounts. Apparently, no plants were licensed in the franchise area. In 1955, Dell made the annual payment pursuant to the agreement, there being no royalty payments by him. The defendant demanded 27½% of said amount, claiming that this sum constituted royalties under the sub-licenses.

"It seems clear that defendant is not entitled to 27½% of the payments made by Dell for the reason, first, such payments are not payments received from sub-licenses and second, such payments are not royalties within the meaning of the agreement between [the parties]." These were the words of the lower court which further held that to call the payments made by Dell a "royalty" would not be proper in view of the definition of "royalty". It relates to revenues based on *use*, and in this case there was no use of the patent.

Judge Martin's order was adopted as the opinion of the Supreme Court, and both decisions seem correct.

State Fair-Trade Laws

Our Supreme Court in *Rogers-Kent, Inc. v. General Electric Co.*[4] considered the State Fair-Trade Act[5] and concluded that it was unconstitutional insofar as it applies to nonsigners because to them it constituted a deprivation of property without due process of law, this being in violation of Section 5, Article I of the Constitution of South Carolina, 1895.

While this decision is in line with the minority view on state fair-trade laws, it still appears to be the correct solution to the controversy. For those interested in and concerned with

4. 231 S. C. 636, 99 S. E. 2d 665 (1957).
5. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 66-91 through 66-95.

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fair-trade laws, it is suggested that this case be thoroughly digested.

Sovereign Immunity

Brame v. Garner[6] was an action against the Fort Jackson Officers' Mess and one of its members. The Mess objected to the jurisdiction of the court as to it on the ground that it was immune to civil suit since it was an instrumentality of the United States and such immunity had not been waived. This was sustained by the trial court to which approval was given by the Supreme Court. The South Carolina statutes concerning suits against unincorporated associations could have no application as the Mess was immune from suit under federal law.

Real Party in Interest

An action for an accounting was brought in *Wise v. Picow*[7] by the person for whose benefit a contract had been entered into by others. The master found as a fact that the plaintiff was the real party in interest and entitled to bring the action. His report was approved by the circuit judge and affirmed by the Court on appeal.

The defendants objected to the allowance of interest by the circuit judge but this also was overruled as no such objection was made to the master's report.

Demurrer

The ancillary receiver of a foreign insurance company brought an action for an accounting in *Wallace v. Timmons*[8] against the defendant as executrix and as an individual. In the complaint were allegations that the defendant's decedent had held funds as trustee for the insurance company, and that the defendant was the sole distributee of the decedent. The action was commenced several years after the death of the decedent.

A demurrer was interposed by the defendant and the special judge sustained it. Two of his grounds were: (2) that the claim is barred by sections 19-473 and 19-474 of the Code; and (3) that it is barred by laches.

On appeal the Supreme Court held that Sections 19-473 and 19-474 were not applicable to the case as the allegations were

6. 232 S. C. 157, 101 S. E. 2d 292 (1957).
7. 232 S. C. 237, 101 S. E. 2d 651 (1958).
8. 232 S. C. 311, 101 S. E. 2d 844 (1958).

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that a trust was involved and not the claims of creditors of an estate. It was also of the opinion that the trial court erred in invoking the question of laches of its own motion in this particular case. Of course, the trial court can invoke the doctrine of laches in proper cases even though not pleaded.

Mandamus

Mandamus proceedings were instituted in *Thomas v. Hollis*[9] to compel the State Educational Finance Commission to disburse funds to a school district for construction of a new school building. Negotiations between the school trustees and the State Educational Finance Commission took place over a period of almost four years before this suit was commenced. From the facts it was ascertained that the commission never unconditionally approved the building of a new high school on the site purchased by the Board of Trustees, even though it had authorized the disbursement to purchase the site itself. Even if the latter were construed as an approval, the Court stated that it was ". . . Doubtful whether the Finance Commission would be precluded from withdrawing such approval . . . The paramount consideration is the best interest of the School District."

The Court further stated that in proper cases mandamus would lie to compel an agency to exercise its judgment or discretion. However, in this case no such relief was sought in the petition; neither was the issue passed upon by the trial court nor raised by the exceptions.

Betterments

Dunham v. Davis[10] was an action to recover real estate. The case had been appealed before on another question and was remanded "for trial of the issue under the pleadings relating to the note and mortgage hereinbefore mentioned, including the accounting involved, as directed in the order of the circuit court." The latter court's order related to improvements to the realty.

The master, after several hearings, rendered his report in which he recommended that defendant be allowed $10,000.00 as "equitable compensation" for what he had done in supervision and protection of the timber, and recommended certain

9. 232 S. C. 330, 102 S. E. 2d 110 (1958).
10. 232 S. C. 175, 101 S. E. 2d 278 (1957).

amounts for other specific items, one being $5,476.35 for expenditures involved in enhancing the value of the land caused by the operations involved in clearing it.

On appeal, the Supreme Court adopted Judge Baker's order as the opinion of the Court. In Judge Baker's order, he held that the $10,000.00 recommended by the master as "equitable compensation" was not proper as nothing which was done fell within the betterment statutes, and that the method to be used in determining the compensation for clearing the farm land was the enhancement in value. The case was referred back to the master on this latter point because there was insufficient evidence to determine the enhanced value.

Pleadings

Barnwell Production Credit Ass'n. v. Hartzog[11] was an action on a promissory note secured by two mortgages, one covering real estate and the other certain chattels. There was an allegation in the complaint to the effect that plaintiff was entitled to possession of the chattels and demand for such possession was made in the prayer of the complaint. The answer by the Hartzogs contained a plea of fraud and deceit and a counterclaim based on the same. A demand for a trial by jury was made by the Hartzogs based on the pleas contained in their answer and also on the claim that the complaint stated a cause of action in claim and delivery in regard to the chattel mortgage.

Judge Henderson decided that the complaint stated a cause of action for foreclosure of the mortgage in equity, refused a trial by jury, and ordered a reference upon plaintiff's motion. His decisions were affirmed by the Supreme Court which held that a court, in construing a complaint suggestive of more than one theory, should sustain the theory intended by the pleader if it is supported by the allegations and should reject as surplusage allegations not in harmony therewith. It was almost academic then for the Court to affirm the trial judge's refusal of trial by jury since all issues of an equity case should be tried in equity.

11. 231 S. C. 340, 98 S. E. 2d 835 (1957).